FILED
SEP 6 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 403

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor,
Petitioner,

vs.

NEAL WILEY, Respondent.

PETITION FOR WRIT OF CERTIORARI To the Supreme Court of Arkansas and BRIEF IN SUPPORT THEREOF.

THOS. T. RAILEY,
W. L. CURTIS,
THOMAS B. PRYOR,
Attorneys for Petitioner.

INDEX

	Page
Petition for Writ of Certiorari	1
Summary Statement of Case	2
Jurisdiction	8
Reasons Relied on for the Allowance of the Writ	9
Prayer for Writ	11
Brief in Support of Petition for Writ of Certiorari	12
I. The Opinion of the Court Below	12
II. Jurisdiction	12
III. Statement of the Case	13
IV. Specification of Errors	13
V. Summary of Argument	14
VI. Argument	11
Point I.	15
Point II.	17
Point III.	18
Point IV.	20
Conclusion	24

TABLE OF CASES CITED

C.M. & St. P. R.R. Co. v. Edith F. Coogan, 271 U.S. 472 13-14-18

Chesapeake & O. Ry. Co. v. Kuhn, 76 Law Ed. 157, 284 U.S. 44 14-18

Cross v. Spokane, P. & S. Ry. Co., 291 Pac. 336, 75 L. Ed. 1436 14-18

Graham v. C. & N. W. R. Co., 143 Iowa 604, 119 N.W. 708 14-22

Page

M. K. & T. R. Co. v. Collier, 157 Fed. 347 14-22

N. O. & N. E. R.R. Co. v. Harris, 247 U.S. 367 11-14-16

Northwestern Pac. R. Co. v. Bobo, 78 L. Ed. 462, 290 U.S. 499 14-18

Penn. R.R. Co. v. Chamberlain, 288 U.S. 333 10-14-16

Quock Ting v. United States, 140 U.S. 417 14-23

St. L. I. M. & S. Ry. Co. v. Armbrust, 121 Ark. 351, (181 S.W. 131) 13-14-16

St. L. S. F. R. Co. v. Carr, 94 Ark. 246, 126 S.W. 850 13-14-16

Samulski v. Menasha Paper Co., 147 Wis. 285, 133 N.W. 142 14-22

Sexton v. M. S. R. Co., 245 Mo. 254, 149 S.W. 21 14-22

Southern Ry. Co. v. Gray, 241 U.S. 333 14-17

Woolworth Co. v. Davis, 41 Fed. (2d) 342 14-23

15 R.C.L. 1058-1059 21

28 U.S.C. 344 13

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. .....

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor,
Petitioner,

vs.

NEAL WILEY, Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor (appellant in the court below), respectfully presents:

I.

SUMMARY STATEMENT OF CASE

This is a petition for a writ of certiorari to the Supreme Court of Arkansas to review the decision and judgment entered in the above cause on May 6, 1940, and petition for rehearing denied on June 10, 1940, and said judgment became final on said date.

Petitioner is the duly appointed, qualified and acting Trustee of the Missouri Pacific Railroad Company, a debtor in the reorganization proceedings of the Missouri Pacific Railroad Company, pending in the United States District Court for the Eastern Judicial District of Missouri, under the provisions of Section 77 of the Bankruptcy Act.

This suit was brought by the respondent against petitioner to recover damages under the Federal Employer's Liability Act. No question was raised as to the respondent being engaged in Interstate Commerce at the time of his injury. Respondent was employed by petitioner as a night watchman upon a bridge located in the State of Oklahoma that had been damaged by a wreck occurring at that point a few days before, and on the night of the 13th of October, 1937, while so engaged, he sustained a serious injury and suit was filed in the Crawford County, Arkansas Circuit Court on the 5th day of December, 1938, in which it was alleged that:

> " * * * a large and heavy piece of coal, slate or debris was caused and permitted to fall from a car on said train, striking and injuring plaintiff."

On March 3, 1939, after answer had been filed, respondent (plaintiff) filed an amendment to his complaint, alleging:

"* * * that the defendant through its said bridge supervisor and foreman carelessly and negligently directed and required plaintiff to so work in said place when the defendant well knew that on account of the conditions as described in plaintiff's complaint that there was danger of coal, debris or other materials being thrown and caused to fall from said train and strike one so situated, which fact was unknown to the plaintiff, and that the said defendant through its said supervisor and foreman carelessly and negligently assured plaintiff that it was safe for him to so work and be in such place; and plaintiff further says that the defendant's fireman or some other employee of the defendant * * * was carelessly and negligently shoveling, handling and moving said coal on said train as the train approached the place where plaintiff was working and where defendant's employees knew he was working, and thereby caused and contributed to causing a large and heavy lump of coal, rock and debris to fall and be thrown from said train and to strike and injure the plaintiff."

Engineer on engine and brakeman riding in cupola of caboose testified that when the only freight train passed going north during the night plaintiff was injured that they saw him lying by the side of the track near a fire and that the train was not flagged by him, as alleged in the complaint and testified to by him.

Defendant filed answer in which assumed risk was pleaded as a defense.

Plaintiff testified that he is twenty-four years old, a man with a family and that he worked extra for the Trustee of the Missouri Pacific Railroad Company for three years; that he was bridge watchman at the time of his injury; that he heard a freight train whistle and that when it came around a curve about three hundred yards from the bridge that he noticed that it never

checked its speed; that there was a slow order over the bridge which required the speed to be reduced to five miles an hour; that he had been instructed by the Bridge Superintendent when a train exceeded its speed limit "to hold a red light up" which was furnished to him for that purpose; that as the freight train approached he displayed his red light and the engineer applied the brakes and that the train gave a big jerk and that he looked up and about that time a piece of coal fell off of the tender and he tried to dodge it, and that's the last thing he ever knew; that the train was about three hundred feet from him when he displayed his red light; that he was afterwards taken to a hospital in Fort Smith, and then to Little Rock, and finally to St. Louis. At Little Rock a written statement was obtained from him in which he stated that:

> "He was carrying a red and white lantern * * * as the engine of this train passed him he waved a white light at the engineer and that is the last that he remembered until he came to himself some time later * * * ; that he could not say what caused him to be knocked out, but learned later that the foreman said that he found a large piece of slate near where he was lying. * * * he was standing out in the open at the time and did not have a chance to see anything on the side of the train and could not say whether or not there were any swinging doors or anything sticking out or hanging down * * * as stated the engine was just passing him and that is all he remembers." (R. 51)

As shown by the record, the first suggestion that he was struck by a lump of coal was when he filed an amendment to his complaint March 3, 1939. Numerous witnesses testified that they had talked to the respondent (plaintiff) and that at all times he disclaimed any knowledge as to how he was injured.

The Supreme Court of Arkansas in its opinion states:

"Counsel for both the appellant and appellee have proceeded upon the theory that the case was one arising under the Federal Employer's Liability Act and that there can be no recovery unless there was proof of a substantial nature establishing negligence on the part of the defendant, the appellant here, and it is not contended on the part of the appellee that he is entitled to any presumption of negligence arising out of the fact that he was injured by the running or operation of the train. Some of the undisputed matters in relation to this accident are to the effect that plaintiff was employed as watchman to remain at or near the end of the bridge, and that after the train had passed over the bridge it was his duty to go upon it and inspect the same for the purposes of determining if any of the supports placed there after there had been a wreck had become loosened or had given away by reason of the heavy weight or strain or vibration in the operation of the train over the bridge, and it was his duty to replace and drive in wedges used for the purpose of furnishing additional supports and strengthening the bridge after it had been damaged in a recent wreck occurring at that point. It was admitted that on account of this damaged and weakened condition of the bridge all trains had 'slow orders,' that is to say, that they were to approach and cross over the bridge at a speed, some witnesses said, not in excess of five miles an hour, others at a rate not in excess of ten miles an hour. * * * He says that he was standing seven or eight feet away from the track as the train passed at the time he was injured; that he had placed himself in that position in an effort to signal the engineer in order to cause him to moderate his speed in approaching the end of the bridge. * * * and, under the evidence appearing in this record, he was the only witness who knew any of the particular facts and circumstances causing him to be hurt. His right of recovery must be deter-

mined almost solely from the events and facts he has been able to detail in relation thereto. The appellee's statement as to the manner in which he was injured is to the effect that as he stood near the railroad track, seven or eight feet away, with lantern in hand, at the time of the approach of the freight train, he was giving signals to cause the engineer to reduce the speed of the train and as the engine passed him a piece of coal or slate, or other heavy object rolled off or fell from the top of the tender, or was thrown therefrom and that it struck him on the head; that he saw the object as it was thrown or jolted, or fell from the tender where the coal is loaded so as to be accessible to the engine, that although he saw it start he was unable to avoid being struck by it. The effect of his testimony was that the engineer in attempting to slow down by application of brakes caused this coal to roll off or fall at this particular time and place. * * *

"We do not consider, however, that the burden is upon plaintiff to explain with minute detail the particular motion, or jolt of the train, if there was any, that may have caused a piece of coal to fall from the tender, from the top or near the outer edge thereof, the place or point from which the plaintiff says this particular missile came that struck him on the head. If there was negligence in loading the coal or any part of it was so placed that it might have fallen off or that it would later fall off and cause the particular injury complained of, we cannot say now, as a matter of law, that a duty devolved upon the appellee at the time of the trial to make an explanation of all the facts that may have been involved causing the particular accident.

"All of us know from observation that locomotives fueled by coal are ordinarily loaded at the coaling stations to capacity and that along the right-of-way, particularly near these coaling stations, lumps of coal sometimes roll off, and may be found near the tracks of a. such railroad companies. Nor

is it extremely unusual to find or see lumps of coal upon the right-of-way of the railroads perhaps considerable distances from the coaling stations.

"Indeed, it appears that coal that has fallen from the top of the tenders is not regarded as the result of a particularly wasteful practice, but probably by the unfortunate poor who live nearby it seems to be considered an involuntarily contribution. * * *

"So, we think, the jury was warranted in finding there was negligence in the operation of the train with the tender loaded as described. There was in addition some proof that the rock found at or very near the place of the accident was slate-like or the kind sometimes found in coal. Such evidence was substantial - positive - not at all impossible or even improbable, though for the most part contradicted."

At the conclusion of the evidence the defendant requested the Court to "give its instruction No. 1" as follows:

"You are instructed that under the law and the testimony the plaintiff has failed to make out a case against the defendant, and you are, therefore, directed to return a verdict in favor of the defendant."

and also instruction No. 8:

"You are instructed that the plaintiff's evidence is insufficient to warrant a finding that the agents of the defendant were careless and negligent in the handling of the work at the time and place of plaintiff's alleged injury, and you will therefore find for the defendant." (R. 309)

The Court, however, gave defendant's instruction No. II among other instructions:

"You are instructed that under the pleadings and proof in this case the plaintiff at the time of his alleged injury was engaged in interstate commerce, as provided in the Federal Employers' Liability Act. And in this connection I instruct you that if you find from the testimony that the plaintiff's alleged injury resulted from the hazards incident to his employment, that then and in that event he assumed such hazards and risks, and therefore cannot recover in this action."

The jury returned a verdict for $30,000.00, the full amount for which suit was brought. The question involved is whether or not the plaintiff under the Federal Employers' Liability Act is entitled to recover.

II.

JURISDICTION

1. The jurisdiction of this court to grant the writ of certiorari is found in United States Code, Title 28, Section 344, paragraph (b), (Judicial Code Sec. 237 as amended) the Supreme Court of Arkansas being the highest Court of that State.

2. The date of the judgment in the Supreme Court of Arkansas is May 6, 1940. A petition for a rehearing was filed and denied and the judgment became final on June 10, 1940, and the Supreme Court made an order granting until September 10, 1940, in which to file petition for certiorari in this Court.

3. The complaint alleges a cause of action under the Federal Employers' Liability Act. The Supreme Court of Arkansas denied to defendant (petitioner here) the defense of assumed risk applicable under said Act and

denied to the defendant (petitioner here) the benefit of the provision of the Act which requires a plaintiff to establish by proof the negligence alleged.

4. The Supreme Court of Arkansas based its conclusion in part upon the presumption of negligence statute of the State of Arkansas, contrary to the decisions of this Court.

III.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Supreme Court of Arkansas has decided important questions involving the Federal Employers' Liability Act and said decision is in conflict with the decisions of this Court.

1. Under the Federal Employers' Liability Act this Court has held in numerous opinions that the defense of assumed risk is available as a defense in a personal injury action brought by an employee against a railroad company, and the Supreme Court of Arkansas denied petitioner this right.

2. Under the Act of Congress and the decisions of this Court the burden of proof is upon the plaintiff in a personal injury damage suit to establish the allegations of negligence in his complaint or petition by a fair preponderance of the evidence and this is a substantive right which the Supreme Court of Arkansas declined to enforce.

3. The Supreme Court of Arkansas holds in its opinion that the question of a preponderance of the evidence is a matter of procedure which is not governed by the Act of Congress. In its opinion it says:

"Having decided that evidence of a substantial nature supports the verdict we decline to enter upon a discussion of facts to decide where the preponderance lies. There is an intimation, if not an insistence that in this class of cases we should do so. Although the Federal Employers' Liability Act creates or declares certain rights permitting recoveries under conditions stated and provides that trials may be had in both state and federal courts, matters of procedure were untouched."

This Court in the case of *Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U.S. 333, has held:

"The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned."

4. The Supreme Court of Arkansas in its opinion states:

"Prior to this time due consideration has been given to facts very similar to those appearing on this appeal. Issues arising out of careless or improper loading of coal on the tender so that a lump fell therefrom causing injuries have arisen and been decided by our own court. * * * The negligence established in the cited case is not different in kind or degree from that proven by appellee."

To support that statement two cases from Arkansas are cited in which the Supreme Court held that under the presumption of negligence statute in Arkansas that the plaintiffs were entitled to recover.

Under the Federal Employers' Liability Act and the decisions of this Court the presumption of negligence statute of Arkansas is not applicable, and therefore the opinion of the Supreme Court of Arkansas is in conflict with the opinions of this court.

This Court in *N. O. & N. E. R.R. Co.* v. *Harris*, 247 U.S. 367, has held that local prima facie statutes are not applicable in suits brought under the Federal Employers' Liability Act and the Court in its opinion also stated that:

> " * * * negligence is an affirmative fact which plaintiff must establish. * * *
>
> "These established principles and our holding in Central Vermont R. Co. v. White, 238 U.S. 507, * * * we think make it clear that the question of burden of proof is a matter of substance, and not subject to control by laws of the several states."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Arkansas, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this case and that said judgment in favor of the appellee in the Court below may be reversed by this Honorable Court and your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

THOS. T. RAILEY,
W. L. CURTIS,
THOS. B. PRYOR,
Counsel for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940

No. .....

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor,
Petitioner,

vs.

NEAL WILEY, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The opinion of the Supreme Court of Arkansas is reported in 140 S.W. Rep. (2d) 676, and a copy thereof is included in the record.

II.

JURISDICTION

The date of the judgment to be reviewed is May 6, 1940. Petition for rehearing was filed and denied and the judgment became final on June 10, 1940. The complaint alleges a cause of action under the Federal Employers' Liability Act. The Supreme Court of Arkansas denied the defendant, petitioner here, the defense of assumed risk applicable under said Act and denied the defendant the benefit of the provisions of said Act and the Supreme Court of Arkansas based its decision in part upon the presumption of negligence statute of the State of Arkansas contrary to the decisions of the Supreme Court of the United States.

The jurisdiction of this Court to grant a writ of certiorari is found in United States Code, Title 28, Section 344, Paragraph (b) (Judicial Code Section 347, as amended.) The Supreme Court of Arkansas is the highest court in that State.

III.

STATEMENT OF THE CASE

It is submitted that the statement of the case made in the petition for writ of certiorari is sufficient and therefore reference is made to it as a compliance with the rule.

IV.

SPECIFICATIONS OF ERROR

1. The Supreme Court of Arkansas erred in affirming the judgment of the Crawford County Circuit Court in this case and in holding that the case of *St. L. I. M. & S. Ry. Co.* v. *Armbrust*, 121 Ark. 351, (181 S.W. 131) and the case of *St. L. & S. F. R.R. Co.* v. *Carr*, 94 Ark. 246, (126 S.W. 850) were controlling, as both of said cases were based upon the presumption of negligence statute in Arkansas, while the case at bar is brought under the Federal Employers' Liability Act.

2. The Supreme Court of Arkansas erred in ignoring the defense of assumed risk.

3. The Supreme Court of Arkansas erred in refusing to apply the law of assumed risk as declared by this Court in the case of *C. M. & St. P. R.R. Co.* v. *Edith F. Coogan*, 271 U.S. 472, and other cases.

4. The Supreme Court of Arkansas erred in holding that the evidence was sufficient to sustain the verdict under the Federal Employers' Liability Act.

SUMMARY OF ARGUMENT

Point 1. The Supreme Court of Arkansas erred in applying as controlling decisions of the Supreme Court of Arkansas based on the Arkansas presumption of negligence statute in this case brought under the Federal Employers' Liability Act.

St. L. I. M. & S. R. Co. v. *Armbrust*, 121 Ark. 351, 181 S.W. 131.

St. L. S. F. R. Co. v. *Carr*, 94 Ark. 246, 126 S.W. 850.

N. O. & N. E. R.R. Co. v. *Harris*, 247 U. S. 367.

Southern Ry. Co. v. *Gray*, 241 U. S. 333.

Penn. R.R. Co. v. *Chamberlain*, 288 U.S. 333.

Point 2. The Supreme Court of Arkansas erred in ignoring the defense of assumed risk.

Chesapeake & O. Ry. Co. v. *Kuhn*, 76 Law Ed. 157, 284 U.S. 44.

Cross v. *Spokane P. & S. Ry. Co.*, 291 Pac. 336.

Northwestern Pac. R. Co. v. *Bobo*, 78 L. Ed. 462, 290 U.S. 499.

Point 3. The Supreme Court of Arkansas erred in refusing to apply the law of assumed risk as declared by this Court.

C. M. & St. P. R.R. Co. v. *Coogan*, 271 U.S. 472.

Point 4. The Supreme Court of Arkansas erred in holding that the evidence was sufficient to sustain the judgment of the trial court.

Graham v. *C. & N. W. R. Co.*, 143 Iowa 604, 119 N.W. 708.

Samulski v. *Menasha Paper Co.*, 147 Wis. 285, 133 N.W. 142.

M. K. & T. R. Co. v. *Collier*, 157 Fed. 347.

Sexton v. *M. S. R. Co.*, 245 Mo. 254, 149 S.W. 21.

Woolworth Co. v. *Davis*, 41 Fed. (2d) 342.

Quock Ting v. *United States*, 140 U.S. 417.

ARGUMENT

The decision of the Supreme Court of Arkansas is a matter of great importance to this petitioner not only in this case, but in other cases that may arise which will be determined by the Supreme Court in accordance with its opinion in this case.

Point I.

The Supreme Court of Arkansas erred in applying as controlling decisions of the Supreme Court of Arkansas based on the Arkansas presumption of negligence statute in this case brought under the Federal Employers' Liability Act.

As suggested, the accident occurred October 13, 1937. Suit was not filed until December 5, 1938, and the allegation as to negligence upon which the case was tried was not alleged in the original complaint but in the amended complaint filed March 2, 1939. The defendant specifically plead as a defense assumed risk and this defense was apparently totally ignored by the Court as it is not mentioned in its opinion.

It appears from the opinion that the Supreme Court of Arkansas relied upon cases based upon the presumption of negligence statute in Arkansas, as the court said:

> "Issues arising out of careless or improper loading of coal on the tender so that a lump fell therefrom causing injuries have arisen and been decided by our own court. The very question more favorably stated for the railroad company than in the instant case appears in St. L. I. M. & S. R. Co. v. Armbrust, 121 Ark. 351, (181 S.W. 131). **The negligence established in the cited case is not different in kind or degree from that proven by appellee.**

St. L. S. F. R. Co. v. *Carr*, 94 Ark. 246, (126 S.W. 850)."

Referring to these cases, we find in the case of *St. L. I. M. & S. R. Co.* v. *Armbrust* that the Court held:

(a) "Proof that plaintiff's injury was caused by the running of a train, raised a presumption of negligence against the railroad company.

(b) "A plaintiff who has been injured by the operation of a train is entitled to recover under the statute, when he has made out a prima facie case, unless the defendant introduces evidence to show that it was not guilty of negligence."

In the case of *St. L. S. F. R. Co.* v. *Carr*, the Court held:

"Where a pedestrian upon a highway is injured by a door projecting from a car during the running of a train, a prima facie case of negligence on the part of the railroad company is made out."

This Court in the case of *N. O. & N. E. R.R. Co.* v. *Harris*, 247 U.S. 367, held:

"The so-called 'Prima Facie Act' of Mississippi, set out below, provides that in actions against railroads for damages proof of injury inflicted by an engine propelled by steam shall be prima facie evidence of negligence. * * *

"The Federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish."

and the Court further stated in that opinion:

"In proceedings brought under the Federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as

interpreted and applied in Federal courts; and negligence is essential to recovery. * * *

"* * * the question of burden of proof is a matter of substance, and not subject to control by laws of the several states."

and in the case of *Southern Ry. Co.* v. *Gray*, 241 U.S. 333, this Court said:

"As the action is under the Federal Employers' Liability Act, rights and obligations depend upon it, and applicable principles of common law as interpreted and applied in Federal courts. Negligence by the railroad company is essential to a recovery; and there is not a scintilla of evidence to show this under the most favorable view of the testimony urged by counsel for defendant in error."

And this Court in the case of *Penn. R.R. Co.* v. *Chamberlain*, 288 U.S. 333, says:

"The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned.

"Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This, of course, is inadmissible."

Point II.

The Supreme Court of Arkansas erred in ignoring the defense of assumed risk.

The petitioner herein, defendant in the trial court, specifically pleaded as a defense assumed risk. He asked for instructions on the doctrine of assumed risk.

In the brief in the Supreme Court of Arkanas under

the heading of "Plaintiff is Barred From A Recovery In This Action Under the Doctrine Of Assumption Of Risks" the point was presented to the Supreme Court of Arkansas and the same point was stressed in the oral argument.

In the case of *Cross* v. *Spokane P. & S. Ry. Co.*, 291 Pac. 336, certeriari denied. 75 L. Ed. 1436, it was held:

> "Be the risks small or great, if they are risks attendant upon or inherent in employment, they are but the usual and ordinary risks of employment, and are assumed."
>
> *Northwestern Pac. R. Co.* v. *Bobo*, 78 Law Ed., 462, 290 U.S. 499.
>
> *Chesapeake & O. Ry. Co.* v. *Kuhn*, 76 Law Ed. 157, 284 U.S. 44.

The plaintiff in this case testified that he was standing within seven or eight feet of the train as it passed and the risk of being struck by some object thrown by the train was one of the ordinary risks of his employment and one which he clearly assumed.

The Supreme Court of Arkansas erred in apparently ignoring this defense as it is not mentioned in the opinion.

Point III.

The Supreme Court of Arkansas erred in refusing to apply the law of assumed risk as declared by this Court.

This Court in the case of *C. M. & St. P. R. Co.* v. *Coogan*, 271 U.S. 472, said:

> "The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act, and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control

> of the several states. This court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. * * *
>
> "It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding."

There is not a scintilla of evidence to show that the tank of the engine was negligently or improperly loaded with coal. The uncontradicted evidence showed that the train had traveled a distance of 57 miles from its terminal where the coal was placed in the tank of the engine to the point where the accident occurred and that about 40% of the coal was used in that distance, and according to the plaintiff's testimony he was standing with a lantern in his hand a distance of seven or eight feet from the track, and his testimony to that effect is quoted by the Supreme Court of Arkansas. The Court also says that the "missile", "object" or "coal" fell or was thrown from the tank of the engine and it is impossible to reconcile that statement with the former written statement of the plaintiff that he did not know how he was injured, and the further fact that no coal was found by anyone at the place where he was standing at the time that he said that a lump of coal struck him.

The Supreme Court of Arkansas in its opinion on this point states:

> "So, we think, the jury was warranted in finding there was negligence in the operation of the train with the tender loaded as described. There was in addition some proof that the rock found at or very near the place of the accident was slate-like or the

kind sometimes found in coal. Such evidence was substantial - positive - not at all impossible or even improbable, though for the most part contradicted."

This statement of the Court we respectfully submit does not supply the deficiency in the evidence. The only evidence tending to establish "that the rock found at or very near the place of the accident was slate-like or the kind sometimes found in coal" is found in the testimony of Will Wiley, father of the respondent, who says:

> " * * * that McLendon, the Assistant Bridge Building Superintendent, told him that he had found a piece of slate, lying near the track, such as came out of coal, and he said it weighed 12 or 15 pounds and that it was slate-like or coal."

This was positively denied by McLendon, but even if the statement had been made it would not constitute evidence "substantial - positive - not at all impossible or even improbable, through for the most part contradicted" as against this petitioner. It is not necessary to cite authority in support of the rule that the declaration of an employee

> " * * * as to who was responsible for an injury, made after its occurrence, is incompetent as against his employer for the reason that his emloyment does not carry with it authority to make declarations or admissions at a subsequent time as to the manner in which he had performed his duties of employment."
>
> *Casteel* v. *Yantis-Harper Tire Co.*, 183 Ark. 912.

Point IV.

The Supreme Court of Arkansas erred in holding that the evidence was sufficient to sustain the judgment of the trial court.

It is stated that the rule as to judicial notice "enumerates three material requisites":

> (a) "The matter of which a court will take judicial notice must be a matter of common and general knowledge. * * *
>
> (b) "A matter properly a subject of judicial notice must be 'known', that is, well established and authoritatively settled, not doubtful or uncertain." 15 R.C.L. 1058-1059.

The Supreme Court of Arkansas in its opinion states:

> "All of us know from observation that locomotives fueled by coal are ordinarily loaded at the coaling stations to capacity and that along the right of way, particularly near these coaling stations, lumps of coal sometimes roll off, and may be found near the tracks of all such railroad companies. Nor is it extremely unusual to find or see lumps of coal upon the right of way of the railroads perhaps considerable distances from the coaling stations.
>
> "Indeed, it appears that coal that has fallen from the top of the tenders is not regarded as the result of a particularly wasteful practice, but probably by the unfortunate poor who live nearby it seems to be considered an involuntary contribution."

If this statement of the Court is to be accepted it would seem to follow that the plaintiff (respondent) also knew, or by the exercise of ordinary care could have known that there was danger in standing too near the track when a freight train was passing, and therefore he assumed the risk. However, the plaintiff states that he was standing a distance of seven or eight feet from the track when a lump of coal the size of his hat fell from the tender and struck him on the head instead of falling directly to the ground. His testimony is not only at variance with his written statement, but is contrary to the law of

gravitation, of which the Supreme Court of Arkansas could have well taken judicial notice. But the Supreme Court of Arkansas states that:

> "It is answered by the testimony of the appellee who says that he saw the object that struck him on the head roll or fall from the top of the tender."

In *Graham* v. *C. & N. W. R. Co.*, 143 Iowa 604, (119 N.W. 708), it is said:

> "The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court."

In *Samulski* v. *Menasha Paper Co.*, 147 Wis. 285, (133 N.W. 142), the Supreme Court of Wisconsin said:

> "The testimony of a witness or finding of a jury contrary to manifest physical situations, common knowledge, or conceded facts, is efficiently impeached thereby."

In *M. K. & T. R. Co.* v. *Collier*, 157 Fed. 347, the Circuit Court of Appeals for the Eighth Circuit said:

> " * * * Where a witness' testimony is positively contradicted by the physical facts, neither the court nor jury can be permitted to credit it."

Petition for certiorari in that case was denied: 209 U. S. 545.

In *Sexton* v. *M. S. R. Co.*, 245 Mo. 254, (149 S.W. 21), the Supreme Court of Missouri said:

> " * * * The statements of plaintiff as to this occurrence must be viewed in the light of all the sursounding facts and circumstances. If the physical facts and all the circumstances appearing in evidence, together with the surrounding conditions, absolutely negative and destroy the force of such statements,

then, in contemplation of law, such statements do not amount to any substantial evidence of the facts to which they relate."

In *Woolworth Co.* v. *Davis*, 41 Fed. (2d) 342, the Court said:

"In the United States court, the rule is that there must be substantial evidence, as distinguished from a scintilla or modicum of evidence, to justify submission of a case to a jury. In *Small Co.* v. *Lamborn & Co.*, 267 U.S. 248, this court speaking through Mr. Justice Van Devanter, said:

'* * * The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury has met with express disapproval in this jurisdiction, as in many others. (Citing cases.)'

"The rule is likewise settled, that 'when the testimony of a witness is positively contradicted by the physical facts, neither the court nor the jury can be permitted to credit it.' (Citing cases.) * * * Judgments cannot and should not stand if they are entered upon testimony that cannot be true."

And this Court in *Quock Ting* v. *United States*, 140 U.S. 417:

"* * * He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, **as to discredit his whole story.**"

The Supreme Court of Arkansas contrary to the decisions of many State courts and the Federal courts makes the following statement:

"If there was negligence in loading the coal or any part of it was so placed that it might have fallen off or that it would later fall off and cause the particular injury complained of, we cannot say now, as

a matter of law, that a duty devolved upon the appellee at the time of the trial to make an explanation of all the facts that may have been involved causing the particular accident."

We submit "that a duty devolved" upon the respondent as plaintiff in his suit to state all of the facts within his knowledge.

CONCLUSION

In conclusion we desire to call this Court's attention to the "Petition for Rehearing" filed in the Supreme Court in which the defense of assumed risk which was raised in the answer and which was included in the instructions requested from the trial court, was also again called to the attention of the Supreme Court in paragraph VI thereof, yet, the Court ignored assumed risk as a defense. This question was also stressed in the oral argument before the Court, but Justice Baker who wrote the opinion was not present during the oral argument.

We respectfully submit that the decision and opinion of the Supreme Court in this case conflicts with many decisions of the Federal Courts, including this Court to which reference has been made herein, and conflict in the opinion of the courts in construing a Federal Statute is a recognized ground for the granting of certiorari.

Respectfully submitted,

THOS. T. RAILEY,
W. L. CURTIS,
THOMAS B. PRYOR,
Counsel for Petitioner.

SEP 27 1940
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 403

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor,
Petitioner,

vs.

NEAL WILEY, Respondent.

SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI

THOS. T. RAILEY,
W. L. CURTIS,
THOMAS B. PRYOR,
Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 403

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor,
Petitioner,

vs.

NEAL WILEY, Respondent.

SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor (appellant in the court below), respectfully suggests that there is a diminution of the record in the above entitled cause, and respectfully moves that this Honorable Court issue its writ of certiorari herein directed to the Arkansas Supreme Court commanding that court to certify and send to this Court certain papers which are of record in that court in this cause. These papers are particularly described as follows:

> Dissenting opinion of the Honorable Griffin Smith, Chief Justice of the Supreme Court of Arkansas, concurred in by Associate Justice Honorable J. Seaborn Holt.

Said dissenting opinion was not on file at the time the Clerk of the Supreme Court of Arkansas prepared the transcript of the record in this cause, and therefore was not included in said record. A certified copy of said opinion is hereto attached.

WHEREFORE, your petitioner prays that a writ of

certiorari be issued out of and under the seal of this Honorable Court directed to the Arkansas Supreme Court commanding that court to certify and send to this Court the papers enumerated herein.

THOS. T. RAILEY,
W. L. CURTIS,
THOMAS B. PRYOR,
Attorneys for Petitioner.

I, Thomas B. Pryor, counsel for the petitioner in the above entitled cause do solemnly swear that the facts recited in the foregoing "Suggestion of a Diminution of the Record and Motion for a Writ of Certiorari" are true; except such facts as are alleged upon information and belief, and, as to those facts, that I believe them to be true.

THOMAS B. PRYOR,
Attorney for Petitioner.

Sworn to and subscribed before me this 21st day of September, 1940.

G. BYRON DOBBS,
Notary Public
State of Arkansas.

(Notary's Seal)
My commission expires: Aug. 10, 1941.

Guy A. Thompson, Trustee for
The Missouri Pacific Railroad
Company, a Bankrupt Debtor, Appellant,

v.

Neal Wiley, Appellee

GRIFFIN SMITH, C. J. (dissenting)

My dissent is based upon what I believe to be a misconception by the majority of the effect of the evidence when contradictory statements of the plaintiff are considered and when improbabilities amounting to fantastic absurdities are weighed against the background.

That plaintiff was injured to some extent there can be no doubt. That he was employed by defendant when the accident occurred is admitted. That he was found in an unconscious condition near a fire on the right-of-way by the crew of a north-bound freight train is testified to by operatives who swore that the train was not flagged.

How the injury occurred is told only by the plaintiff who first acknowledged that he did not know. He subsequently gave a thirty-thousand-dollar account of having looked up into the blackness of night in time to see a piece of coal or slate fall from the tender of a freight train he claims to have flagged. A preponderance of the evidence is to the effect that no such train was being operated.

In actions at law in this court **substantial** evidence of an essential fact is required. Trial courts are concerned with a preponderance. But **substantial** evidence should not lose its significance and become confused with shadows of substance—shadows which in the instant case do not rise to the dignity of scintilla.

It is obvious that plaintiff's identification of the falling object was an incident of trial necessity and that the revised version was an inspiration seized upon after there was realization that the first explanation was insufficient under the Federal Employer's Liability Act.

Resourcefulness seems to have supplied the element of liability in a chain of contention which to me appears too weak to stand judicial test.

Mr. Justice Holt concurs in this opinion.

(Endorsed)
Filed September 9, 1940.
C. R. Stevenson, Clerk.

IN TESTIMONY That the above is a true copy of the dissenting opinion of the Supreme Court, in the case therein stated.

I, C. R. Stevenson, Clerk of said Court, hereto set my hand and affix the Seal of said Court at my office, in the City of Little Rock, this the 20th day of Sept., A.D. 1940.

(Signed) C. R. Stevenson, Clerk
By Frank H. Cox, D.C.

FILED
NOV 15 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1940

No. 403

GUY A. THOMPSON, TRUSTEE for the MISSOURI PACIFIC RAILROAD COMPANY, Debtor,
Petitioner,

vs.

NEAL WILEY, Respondent.

PETITION FOR REHEARING

THOS. T. RAILEY,
W. L. CURTIS,
THOMAS B. PRYOR,
Attorneys for Petitioner.

INDEX

TABLE OF CASES

Page

Arkansas Bankers Association v. Ligon, 295 S.W. 4, 174 Ark. 234, 53 A.L.R. 534 6

Evins v. St. Louis & S.F. R. Co., 147 S.W. 452, 104 Ark. 79 4

K.C.S. Ry. Co. v. Rogers, 225 S.W. 640, 146 Ark. 232 6

McElvaney v. Smith, 88 S.W. 981, 76 Ark. 68, 6 Ann. Cas. 458 6

National Fruit Products Co. v. Garrett, 181 S.W. 926, 121 Ark. 570 5

Patterson v. Risher, 221 S.W. 468, 143 Ark. 376 5

St. Louis A. & T. Ry. Co. v. Triplett, 16 S.W. 266, 54 Ark. 289, 11 L.R.A. 773 5

St. Louis Southwestern Ry. Co. v. Grayson & Seitz, 115 S.W. 933, 89 Ark. 154 5

Western Union Telegraph Company v. Arant, 115 S.W. 136, 88 Ark. 499 5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1940

No. 403

GUY A. THOMPSON, TRUSTEE for the MISSOURI PACIFIC RAILROAD COMPANY, Debtor,
Petitioner,

vs.

NEAL WILEY, Respondent.

PETITION FOR REHEARING

The petitioner in the above cause respectfully presents his petition for rehearing and desires to call this Court's attention to decisions of the Supreme Court of Arkansas involving matters of procedure, which may have been considered by this Court in denying the petition for certiorari.

The order entered denying the petition for certiorari states:

> "On consideration of the suggestion of a diminution of the record and motion for a writ of certiorari in that relation, the motion for a writ of certiorari is granted. The petition for writ of certiorari to the Supreme Court of the State of Arkansas is denied."

Respondent in his "Brief and Argument of Respondent in Opposition to Petition for Writ of Certiorari" (page 6) states:

> "As stated, the original complaint was filed on December 5, 1938. Petitioner filed answer to the original complaint on March 2, 1939, in which the defense of assumption of risk was plead (R. 5). It is further disclosed that on March 3, 1939, such amendment was filed (R. 6). On March 13, 1939, ten days after the filing of this amendment, petitioner filed 'Answer to Amended Complaint' (R. 7). All that was stated in this answer is, 'That he denies each and every material allegation in said amended complaint set out and contained.' There is not the slightest reference to assumption of risk, which is an affirmative defense and, under the law of procedure both in the State of Arkansas and in the Federal courts, must be affirmatively plead, as we shall show."

and on page 12 under the heading "The Contention That the Supreme Court of Arkansas Erred in Ignoring the Defense of Assumed Risk" respondent stated:

> "Under this head it is stated: 'The petitioner herein, defendant in the trial court, specifically pleaded as a defense assumed risk. He asked for instructions on the doctrine of assumed risk.' As we have previously shown, as to the amended complaint which he contends contained the only allegation of negligence upon which the cause was submitted to the jury, he did not in any way plead as a defense assumption of risk (R. 7). Under the rules and law

of procedure of the State of Arkansas, such defense is an affirmative one and must be specifically plead."

The record on page 6 shows that there was not an "Amended Complaint" filed, but there was filed March 3, 1939, "Amendment to Complaint." It is true that on page 6 of the record it appears that defendant filed "Answer to Amended Complaint" when it should have been styled "Answer to Amendment to Complaint", and the defense of assumed risk having been specifically pleaded in the original answer (R. 5) there was no necessity for again pleading it in the "Answer to Amendment to Complaint."

We do not know to what extent, if any, this suggested technicality became involved in the Court's consideration of the petition for certiorari, and therefore we desire to call this Court's attention to the fact as shown by the record that the issue of assumed risk was not only submitted to the jury but that the plaintiff (respondent) in his instruction No. 5 requested the court to instruct the jury on that issue and the court gave said instruction:

Instruction No. 5

"You are instructed that the plaintiff by engaging in the service of the defendant assumed the risk of injury from the ordinary and usual risks and hazards that are incident to the business in which he was engaged, and assumed the extraordinary risks, if any, of his employment of which he had knowledge and appreciated the danger of which were so obvious that an ordinarily prudent person would have known and appreciated the danger, but he did not assume (fol. 301) the risk of any negligence upon the part of the defendant unless he knew of such negligence, if any, and appreciated the danger to

himself therefrom and thereafter continued in his employment, or unless such negligence, if any, was so open and patent that a person of ordinary intelligence and observation must have known of such negligence, if any, and appreciated the danger therefrom (R. 168).

and the defendant (petitioner) also requested an instruction on that issue which was given by the court (R. 174) as follows:

Instruction No. 2

"You are instructed that under the pleadings and proof in this case the plaintiff at the time of his alleged injury was engaged in interstate commerce, as provided in the Federal Employer's Liability Act. And in this connection I instruct you that if you find from the testimony that the plaintiff's alleged injury resulted from the hazards incident to his employment, that then and in that event he assumed such hazards and risks, and therefore cannot recover in this action."

Therefore, this situation is presented. The plaintiff (respondent) insisted in his "Brief and Argument of Respondent in Opposition to Petition for Writ of Certiorari" that the question of assumed risk was not pleaded by defendant (petitioner) in its "Answer to Amendment to Complaint" and therefore was not an issue in the case. However, having asked an instruction submitting that issue the respondent (plaintiff) is estopped under the decisions of the Supreme Court of Arkansas from asserting that the issue of "assumed risk" was not in the case.

The Supreme Court of Arkansas in the case of Evins v. St. Louis & S. F. R. Co., 147 S. W. 452, 104 Ark. 79, held:

> "One may not complain of an erroneous instruction if he has asked an instruction containing the same error."

In National Fruit Products Co. v. Garrett, 181 S. W. 926, 121 Ark. 570, the Court held:

> "The error of the trial court in instructing the jury on an issue not raised by the evidence is harmless where both sides requested an instruction on that issue."

In Western Union Telegraph Company v. Arant, 115 S. W. 136, 88 Ark. 499, the Court said:

> "Appellant cannot complain of an error of the trial court which it invited by its own instruction."

In St. Louis Southwestern Ry. Co. v. Grayson & Seitz 115 S. W. 933, 89 Ark. 154, the Court held:

> "Appellant cannot complain of an erroneous instruction which was given at his request."

In Patterson v. Risher, 221 S. W. 468, 143 Ark. 376, the Court held:

> "Where plaintiff administrator of a deceased employee asked that the issues of contributory negligence and assumption of risk be submitted to the jury, which prayers were granted, on his appeal he cannot complain of any error in such submission, having invited it."

Numerous other cases of the Arkansas Supreme Court might be cited in support of the rule that where the plaintiff assumes an issue to be involved in a case he cannot on appeal assume an inconsistent position.

The petitioner herein interposed the defense of assumed risk and the issue was submitted to the jury in the trial court and was submitted to the Supreme Court

of Arkansas, but was entirely ignored by that court. There was not a suggestion, however, in that court that assumed risk as a defense was not properly pleaded because it was not included in the answer to the amendment to the complaint, but neither in the opinion rendered by the majority of the court nor the minority opinion rendered by Chief Justice Griffin Smith was any reference made to assumed risk as a defense, and we are unable to determine from the record as to whether or not it was considered by this Court. The dissenting opinion of Chief Justice Griffin Smith is based upon the lack of "substantial evidence" to support the judgment.

It is the well settled rule in Arkansas that pleadings will be treated as amended to conform to the proof in such a case as involved here.

In the case of Arkansas Bankers Association v. Ligon, 295 S. W. 4, 174 Ark. 234, 53 A. L. R. 534, it was held that where an issue not specifically raised in the pleadings was raised by plaintiff's undisputed testimony the court should have treated the pleadings as amended to correspond with the evidence. There are numerous other Arkansas decisions to the same effect.

St. Louis A. & T. Ry. Co. v. Triplett, 16 S. W. 266, 54 Ark. 289, 11 L. R. A. 773.

McElvaney v. Smith, 88 S. W. 981, 76 Ark. 68, 6 Ann. Cas. 458.

K. C. S. Ry. Co. v. Rogers, 225 S. W. 640, 146 Ark. 232.

The question of whether or not the defense of assumed risk was properly pleaded was raised in this Court for the first time. The attorneys for the plaintiff (respondent here) treated it as an issue. The petitioner here treated it as an issue. The trial court treated it as an issue, and at the request of both sides submitted an instruction concerning the defense of assumed risk. That there was ample testimony on this point is evidenced by the statement in the majority opinion of the Supreme

Court of Arkansas, where it is stated that it is common for coal to fall from trains and while the opinion of the Supreme Court of Arkansas does not mention assumed risk, yet in view of this statement that such an occurrence is common knowledge, certainly the plaintiff assumed the risk of standing in the position claimed by him.

We respectfully submit that this petition for rehearing should be granted and that the petition for certiorari should be granted and the cause reversed.

Respectfully submitted,

THOS. T. RAILEY,
W. L. CURTIS,
THOMAS B. PRYOR,
Attorneys for Petitioner.

CERTIFICATE

I, Thomas B. Pryor, member of the bar of this Court, do hereby certify that I have prepared the above and foregoing petition for rehearing and that this petition is presented for the purpose of calling this Court's attention to the decisions of the Supreme Court of Arkansas with reference to the alleged omission to plead assumed risk in this case and not for the purpose of delay.

THOMAS B. PRYOR,
Counsel for Petitioner.

SEP 25 1940

IN THE

Supreme Court of the United States

October Term, 1940

No. 402

GUY A. THOMPSON, TRUSTEE FOR THE MISSOURI PACIFIC RAILROAD COMPANY ..... *Petitioner,*

v.

NEAL WILEY ..... *Respondent.*

BRIEF AND ARGUMENT OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS W. ASHE,
DAVID S. PARTAIN,
Counsel for Respondent.

INDEX

Page

Statement of Respondent 1

Argument of Respondent 10

Argument of Respondent in Response to Petitioner's Point I. The contention that the Supreme Court of Arkansas erred in applying as controlling decisions of the Supreme Court of Arkansas based on the Arkansas presumption of negligence statute in this case brought under the Federal Employers' Liability Act 10

Argument of Respondent as to Petitioner's Point II. The contention that the Supreme Court of Arkansas erred in ignoring the defense of assumed risk 12

Argument of Respondent in Response to Petitioner's Point III. The contention that the Supreme Court of Arkansas erred in refusing to apply the law of assumed risk as declared by this court 13

Argument of Respondent in Response to Petitioner's Point IV. The contention that the Supreme Court of Arkansas erred in holding that the evidence was sufficient to sustain the judgment of the trial court 16

Table of Cases

St. L. I. M. & S. R. Co. v. Armbrust, 121 Ark. 351 ..... 11, 12

St. L. S. F. R. Co. v. Carr, 94 Ark. 246 ..... 11, 12

Clark Lumber Co. v. Johns, 98 Ark. 211-214 12

Great Northern Ry. Co. v. Leonidas, 305 U. S. 1 14

Metropolitan Life Ins. Co. v. Gregory, 188 Ark. 516-520 17

Osborne v. Hittson, 118 Ark. 349-352 18

Mo. Pac. R. Co. v. Remel, 185 Ark. 598 18

Gunning v. Cooley, 281 U. S. 90 18

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555 19

Seaboard Air Line Ry. v. Koennecke, 239 U. S. 352 19

Louisville & N. R. Co. v. Stewart as Admx., 241 U. S. 261 19

IN THE

Supreme Court of the United States

October Term, 1940

No. 403

GUY A. THOMPSON, TRUSTEE FOR THE MISSOURI PACIFIC RAILROAD COMPANY ..... *Petitioner,*

v.

NEAL WILEY ..... *Respondent.*

BRIEF AND ARGUMENT OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF RESPONDENT

We feel it proper to call attention to some of the glaring misstatements contained in petitioner's "Summary Statement of Case," beginning his brief (P. 2). At the outset it is stated by petitioner, his brief (P. 4): "As shown by the record, the first suggestion that he (respondent) was struck by a lump of coal was when he filed an amendment to his complaint March 3, 1939. Numerous witnesses testified that they had talked to the respondent (plaintiff) and that at all times he disclaimed any knowledge as to how he was injured." How petitioner can make this statement in the light of the record is beyond our conception. True, there was an amendment filed to the

complaint on March 3, 1939, but such amendment in no wise materially changed the allegations of negligence but set them out with more particularity, especially in reference to the conduct and action of petitioner's bridge superintendent, McLendon, in his instructions and directions to respondent as to his duties and the manner in which he was to perform his work.

The original complaint of respondent was filed in the Crawford Circuit Court on December 5, 1938, and appears R. 1-4. Among other allegations appearing in that complaint are the following:

> "That plaintiff's injuries and damages were caused and occasioned by the carelessness and negligence of the defendant, his servants, agents and employees, whose names are unknown to the plaintiff but well known to the defendant, in that said employees of the defendant carelessly and negligently placed and stacked and loaded and permitted and caused to be placed, stacked and loaded large and heavy pieces of coal, slate and debris in such manner on said car as to cause same to be loose, insecure, dangerous and unsafe, and carelessly and negligently loaded and overloaded said car and caused and permitted same to be carelessly and negligently loaded and overloaded so that a large and heavy piece of said coal, slate and debris would in the operation of said train fall therefrom, and carelessly and negligently failed to exercise ordinary and reasonable care to make reasonable inspection of said car and the load thereon to determine whether or not same was reasonably safe for transportation and whether or not same was properly loaded,"

and further alleged negligence in the operation of the train over this particular track where the slow orders were admittedly in effect; and continues with the allegations that:

> "said employees carelessly and negligently so operated said train as to cause a sudden, unusual and violent jerk and lurch of said train and of said car at said point, thereby causing and contributing to causing said piece of coal, slate and debris to be dislodged and to fall as aforesaid, which said acts of negligence, operating both singly and together, produced and brought about plaintiff's injuries."

This certainly disposes of petitioner's remarkable contention. It is conclusively demonstrated that, contrary to the flat statement that the first suggestion of his being struck by a lump of coal was in respondent's amended complaint, that he alleged in his original complaint in detail the loading of the coal car or tender, the negligent operation of the train, and the consequent falling of "a large and heavy piece of said coal, slate and debris."

Also, the statement above of petitioner in reference to "numerous witnesses" testifying that they had talked to respondent and that he at all times disclaimed any knowledge as to how he was injured, is likewise a gross misstatement of the facts as disclosed by the record. Petitioner fails to call attention as to where in the record the testimony of these "numerous witnesses" may be found. It does not appear. The nearest approach to it is a statement taken from respondent in a hospital in the city of Little Rock, some three weeks after his injury, by a claim representative of petitioner, and the testimony in reference to this statement upon behalf of respondent is that he knew nothing about the preparation of the statement or its contents, and had no recollection whatever in connection with it. His testimony in this respect is thoroughly borne out by the medical testimony as to his condition at that

time and his inability to realize the effect of any statement made by reason of the admitted terrible injury which he had suffered to his head, and it is significant that although, as shown by the record, during the year preceding the bringing of the suit respondent spent most of his time in at least three hospitals operated by petitioner, and was in one at the very time the alleged statement is said to have been made, and yet no physician of petitioner was placed upon the witness stand to deny or explain his physical and mental condition at the time of the alleged statement. In any event, of course, these matters were all questions of fact to be determined by the triers of fact, but at the same time petitioner should be more careful of statements in reference to the record.

Another misstatement contained in petitioner's alleged "Reasons Relied on For the Allowance of the Writ," appears in connection with his discussion of the question of liability by the Arkansas Supreme Court and as to negligence in connection with the improper loading of coal on coal tenders. Petitioner calls attention, his brief P. 10, to the statement of the Arkansas Supreme Court that "The negligence established in the cited case is not different in kind or degree from that proven by appellee," and it continues with the statement, "To support that statement two cases from Arkansas are cited in which the Supreme Court held that under the presumption of negligence statute in Arkansas that the plaintiffs were entitled to recover."

It is obvious from the opinion of the Supreme Court of Arkansas in the case at bar, which opinion, not officially reported, appears 140 S. W. (2d) 676, and is contained in full in R. 179, that the court made no reference

to either of these cases upon any question of the method or manner of proof, but said in referring to them only the thing that must be admitted, that "the negligence established" in these particular cases "is not different in kind or degree from that proven by appellee." The Supreme Court of Arkansas had already set out at great length the method in which this particular negligence had been proven by the respondent here. Among other things, the court said in its opinion:

> "* * * Counsel for both the appellant and the appellee have proceeded upon the theory that the case was one arising under the Federal Employers' Liability Act and that there can be no recovery unless there was proof of a substantial nature establishing negligence on (fol. 326) the part of the defendant, the appellant here, and it is not contended on the part of the appellee that he is entitled to any presumption of negligence arising out of the fact that he was injured by the running or operation of the train."

It was not so contended by the respondent, and the case was tried throughout upon the theory that the burden was upon him to establish negligence by the testimony. This was very clearly and definitely recognized by the Supreme Court of Arkansas. That respondent did prove negligence both in the loading of the tender, which proof was practically undisputed, and in the negligent operation of the train under the circumstances, is disclosed by the record. The Supreme Court of Arkansas in the course of its opinion merely stated that such established negligence was of the same character as that in the two cited cases, which cases, as to negligence, announced principles of law long recognized by this and other courts.

As to the Armbrust case referred to, the Supreme Court of Arkansas did not hold that the plaintiff in that case was entitled to recover under any "presumption of negligence statute in Arkansas." On the contrary, it held that the doctrine of *res ipsa loquitur* applied, and at the same time referred to proof which showed negligence upon the part of the defendant, saying among other things:

> "The plaintiff testified that he saw the tender before the flying object left it and stated that it looked to him as if the tender was overloaded with coal and that he noticed a big pile of coal on the top of it."

The court went on to discuss other testimony in the case as to the loading of the tender and the operation of the train, and held that:

> "* * * Under the circumstances surrounding the accident, the jury might have found that the defendant's witnesses were mistaken in saying that the tender was properly loaded on the day in question; or they might have found that a lump of coal was allowed to fall off because of the careless handling of it by the fireman."

It is readily apparent that the only reference to these cases made by the Supreme Court of Arkansas was that the negligence established was of a similar character, and that such reference had no applicability whatever to the method of proof in establishing the acts of negligence.

Throughout the opinion in this case it is stated very clearly that no presumption of negligence was available, that not even the doctrine of *res ipsa loquitur* was given any effect, but that the burden was upon the respondent to establish such similar acts of negligence by substantial

evidence in the case. That he did so is disclosed by the record, and that petitioner's statement in this connection is clearly erroneous must be obvious.

These misstatements of petitioner as to the record occur so frequently and with such persistency that it would create a trespass upon the time of the court to undertake calling attention to all of them. We at this point mention one other, which is a repetition of one previously made in petitioner's brief. We refer to the statement made, petitioner's brief P. 15, as follows: "As suggested, the accident occurred October 13, 1937. Suit was not filed until December 5, 1938, and the allegation as to negligence upon which the case was tried was not alleged in the original complaint but in the amended complaint filed March 2, 1939. The defendant specifically plead as a defense assumed risk and this defense was apparently totally ignored by the Court as it is not mentioned in its opinion." We have already shown emphatically and the record discloses unquestionably that "the allegation as to negligence upon which the case was tried" *was* alleged in the original complaint, filed on December 5, 1938. There is no showing anywhere that the court ignored any defense of assumed risk upon the part of petitioner. The question of assumed risk was submitted to the trial jury under numerous instructions. If there was any error in this connection it was in submitting the issue at all, because a reference to the record discloses that there was no substantial evidence upon which to base this contention. The Supreme Court of Arkansas in its opinion and consideration of the case evidently considered that question. The statement of the case, as shown by the opinion and as disclosed by the tes-

timony, establishes that at the very most the issue was one of fact, submitted under instructions not complained of, and determined by the jury. In reference to this statement contained by petitioner in its brief (P. 15), we might well call attention to the fact that, contrary to his statement, so far as the amended complaint which he says is the one that alleged the act of negligence upon which the case was tried, he did not at any time by answer or proper plea even so much as plead "as a defense assumed risk."

As stated, the original complaint was filed on December 5, 1938. Petitioner filed answer to the original complaint on March 2, 1939, in which the defense of assumption of risk was plead (R. 5). It is further disclosed that on March 3, 1939, such amendment was filed (R. 6). On March 13, 1939, ten days after the filing of this amendment, petitioner filed "Answer to Amended Complaint" (R. 7). All that was stated in this answer is, "That he denies each and every material allegation in said amended complaint set out and contained." There is not the slightest reference to assumption of risk, which is an affirmative defense and, under the law of procedure both in the State of Arkansas and in the Federal courts, must be affirmatively plead, as we shall show.

Notwithstanding this, however, every instruction requested by petitioner on the issue of assumed risk was given by the trial court, and he made no request to the trial court to declare that respondent was guilty of assumed risk as a matter of law, but evidently realized throughout that at most it was a question of fact. Neither is any such question raised in petitioner's motion for new trial (R. 10).

It surely is unnecessary to make reference as to statements contained in petitioner's brief as to matters contended to have been raised in briefs and in oral argument which are not apparent of record.

ARGUMENT

Petitioner begins his argument with the statement to the effect that the decision of the Supreme Court of Arkansas is of great importance to petitioner, not only in this case but in others which may arise and be determined. He does not, however, go to the extreme of seriously insisting that the State court in this instance "has decided a Federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Nothing in his argument or presented in the record would indicate any such situation.

POINT I

The contention that the Supreme Court of Arkansas erred in applying as controlling decisions of the Supreme Court of Arkansas based on the Arkansas presumption of negligence statute in this case brought under the Federal Employers' Liability Act.

As we have already shown in our statement, the statement contained in the first paragraph of petitioner's brief on this point (P. 15), to the effect that the act of negligence upon which the case was tried was not alleged until the filing of the amended complaint, is absolutely incorrect.

It would seem that nothing further need be said beyond the reference in our statement as to the remarkable contention that the decision of the Supreme Court of Arkansas in the case at bar is based upon the presumption of negligence statute in Arkansas. As we have already shown, the reference in the opinion as to these cases was as to

the character of negligence and not the method of proof. Reference in the opinion is only made, as is obvious, to the cases of *St. L. I. M. & S. R. Co.* v. *Armbrust,* 121 Ark. 351, and to *St. L. S. F. R. Co.* v. *Carr,* 94 Ark. 246, for the purpose of showing that, as according to the uniform weight of authority, the careless or improper loading of coal on a tender or car, as well as the negligent operation of the train so loaded, constitutes negligence. We have already called attention to what was said in the Armbrust case in reference to this proposition.

In the Carr case, the Supreme Court of Arkansas said:

> "A railroad company is bound to use ordinary care and caution to avoid injuring persons who may be near its tracks, and who are rightfully at such place; and whether or not under all the circumstances of the case the railroad company was negligent in permitting any object or article which caused the injury to project or fall from its train of cars is a question of fact for the jury to determine."

Surely there can be no quarrel with this definition of elementary law.

Cases cited as to facts making out a *prima facie* case by petitioner have no application whatever. The Supreme Court of Arkansas in the case at bar made it very clear that there was no presumption of negligence "and that there can be no recovery unless there was proof of a substantial nature establishing negligence on the part of the defendant." That was the whole basis of the decision, as shown throughout the opinion, and that is the rule in Arkansas and in this court under the Federal Employers' Liability Act.

After the reference to the Armbrust and Carr cases, *supra,* the Arkansas Supreme Court said:

> "Furthermore, if we give to appellee's evidence that consideration favorable to sustain the verdict and judgment we must reach the conclusion there was other and additional negligence in the operation of the train. He may rightly invoke this rule."

The opinion deals at length with the evidence, and speaks for itself that it is in complete conformity with all the decisions of this court upon the subject.

POINT II.

The contention that the Supreme Court of Arkansas erred in ignoring the defense of assumed risk.

Under this head it is stated: "The petitioner herein, defendant in the trial court, specifically pleaded as a defense assumed risk. He asked for instructions on the doctrine of assumed risk." As we have previously shown, as to the amended complaint which he contends contained the only allegation of negligence upon which the cause was submitted to the jury, he did not in any way plead as a defense assumption of risk (R. 7). Under the rules and law of procedure of the State of Arkansas, such defense is an affirmative one and must be specifically plead.

As was said in the case of *Clark Lumber Co.* v. *Johns,* 98 Ark. 211-214:

> "Assumption of risk by the plaintiff, being based on an implied contract, was a matter of defense to be pleaded by the defendant."

However, notwithstanding this failure upon the part of the petitioner, and notwithstanding its failure of proof upon

this proposition, the issue was at its request submitted to the jury in repeated instructions, as follows: Instruction No. 6 (R. 175); Instruction No. 7 (R. 175); Instruction No. 10 (R. 176); Instruction No. 11 (R. 176). As we have previously shown, no instruction was requested to the effect that respondent was guilty of assumption of risk as a matter of law, and no such contention made in the record.

In response to petitioner's statement that "The plaintiff in this case testified that he was standing within seven or eight feet of the train as it passed," we call attention to the uncontradicted testimony that he was standing where he had been ordered and directed to stand by petitioner's bridge superintendent, McLendon; that he was where he necessarily had to be to perform the duties of his employment; that he was as far away from the track as was possible without getting down into a ditch some twenty feet in depth, where the performance of his duties would have been absolutely impossible, and to the further fact that in the absence of negligence the position where he was standing and required to be would have been a place of absolute safety (R. 25-26-27).

POINT III.

The contention that the Supreme Court of Arkansas erred in refusing to apply the law of assumed risk as declared by this court.

It would seem that this is practically the same contention made by petitioner under a previous heading. As we have already shown, the Supreme Court of Arkansas did not in any wise refuse to apply the law of assumed risk. In addition to that, it does not appear that the argument

sought to be made by petitioner under its "Point III," its brief pp. 18-20, is based upon the question of assumption of risk, but it is more in the nature of an argument as to the weight of the evidence.

It has never been questioned that at the time of the occurrence of this injury the rule of assumption of risk was in effect, as stated by petitioner. In cases arising under the Federal Employers' Liability Act, such defense has since been completely abolished, "Acts of 76th Congress, approved August 11, 1939, amending Sections 51 and 54, 45 U. S. C. A." It is not insisted, however, that this act is retroactive, but it is insisted that the law as in effect at the time of the injury was applied by the courts of Arkansas even though not properly plead by petitioner.

In the recent case of *Great Northern Ry. Co.* v. *Leonidas,* 305 U. S. 1, this court had before it a case where the Supreme Court of Montana had erroneously held that under the law then in effect assumption of risk was not available as a defense in a case under the Employers' Liability Act. This court, while holding that such a declaration of law was erroneous, at the same time said:

> "Despite this erroneous ruling, we are of the opinion that the judgment should be affirmed upon the first ground taken by the state court, that is, that the question of assumption of risk was for the jury. It is not contended that the instructions of the trial court upon that defense were erroneous. The contention is that there was no evidence to go to the jury. We think that there was."

It is unnecessary to discuss the argument under this heading advanced by petitioner as to evidence in reference to the negligent or improper loading of the tender. These

matters, as shown by the record and the decision of the Supreme Court of Arkansas, were disputed questions of fact. A reference to the record discloses that while there was positive testimony on the part of the respondent as to the coal being stacked up beyond the edge of the tender and it coming from the tender and striking him when the speed of the train was checked suddenly and violently, the evidence on behalf of petitioner undertaking to contradict this was very uncertain and unsatisfactory indeed.

Petitioner at this point, in discussing the opinion of the Supreme Court of Arkansas, makes the very obviously erroneous statement that, "The only evidence tending to establish 'that the rock found at or very near the place of the accident was slate-like or the kind sometimes found in coal' is found in the testimony of Will Wiley, father of the respondent," and that this is in reference to a statement of McLendon, the assistant bridge superintendent, as to what he found. Petitioner is markedly in error in this statement. There was much evidence from his own employees tending to show this situation. It was admitted by all of them that there was a rock found near where respondent was found in an unconscious condition by the other employees hours after the injury. These employees differed to some extent in the description of this object, both as to its color, its shape and its size, but it is obvious from the testimony of all of them that they turned instinctively to this object as being the cause of the injury. The description of it, made by a number of such employees, completely bears out the statement that it was such a stone or rock that is sometimes found in coal, that it was "slate-like."

McLendon, the bridge superintendent, testified in reference to it: "It was dark colored" (R. 100).

Mike Moore, petitioner's assistant bridge foreman at the time, described it as follows: "No, sir, it was not a black rock, my recollection was that it was dark blue, kind of brown" (R. 105).

Petitioner's "inspector of bridges" described it as "dark blue" (R. 109-110).

Numerous other employees variously described this object. They differed to some extent as to its color particularly, but certainly this testimony from his own employees is amply sufficient to refute petitioner's criticism of the declaration of the Supreme Court of Arkansas in reference to the color or appearance of this object, which very significantly was not preserved by these representatives of petitioner.

POINT IV.

The contention that the Supreme Court of Arkansas erred in holding that the evidence was sufficient to sustain the judgment of the trial court.

Finally, under this heading it is contended by petitioner that the Supreme Court of Arkansas in its opinion was in error in holding that there was sufficient substantial testimony to warrant the submission of the issue of negligence to the jury. In urging this view, petitioner principally relies upon the contention that respondent's testimony at the trial varied in some particular with a written statement purported to have been signed by him three weeks after the injury, while he was in petitioner's

hospital under the treatment of his physicians, a statement which respondent testified he had no knowledge of making, which the medical testimony showed in the case that he in all probability would not know about making, and which testimony was not denied by any of petitioner's physicians at his hospital in Little Rock; and upon the further proposition of the bald statement that the testimony "is contrary to the law of gravitation," without any suggestion whatever of wherein such a state of facts conflicts in any way with the law of gravitation.

The undisputed evidence shows that the train was going around the curve at the time it is claimed its speed was suddenly and violently checked with a violent and unusual jerk. Anyone would know that the direction in which an object such as this might go, and where it might finally rest would depend upon all of these conditions as well as upon its particular situation in reference to other objects on the tender or car. These were, of course, all matters for the determination of the jury, and nothing about the situation whatever is contradicted by physical facts. The Supreme Court of Arkansas applied in this case exactly the same rule as it has in other cases, and as this court has recognized in all cases governed by the Federal Employers' Liability Act, and that is the common-law rule of evidence as interpreted by the Federal courts.

Petitioner cites authorities holding that the scintilla rule of evidence does not apply in the Federal court. Neither does it apply nor has it ever applied in the Supreme Court of Arkansas.

In the case of *Metropolitan Life Ins. Co.* v. *Gregory*, 188 Ark. 516-520, the Supreme Court of Arkansas said:

"* * * This court has not adopted the scintilla of evidence rule."

In the case of *Osborne* v. *Hittson,* 118 Ark. 349-352, the Supreme Court of Arkansas said:

"* * * We have never adopted the scintilla rule in this State; on the contrary, we have uniformly held that to uphold a verdict on appeal, there must be some substantial evidence to support it."

In the case of *Mo. Pac. R. Co.* v. *Remel,* 185 Ark. 598, in which certiorari was denied by this court, the Arkansas Court again said in reference to an action under the Federal Employers' Liability Act:

"In an action under this chapter, verdicts supported only by scintilla of evidence will not be sustained."

It was further said in that case:

"In an action under this section neither state nor federal court will sustain verdict based on speculation and conjecture."

Many other cases to the same effect might be cited, but we think it apparent that the rule as often announced in Arkansas, and as particularly applied in the case at bar, is exactly the same as that recognized by this court.

In the case of *Gunning* v. *Cooley,* 281 U. S. 90, this court said:

"Issues that depend on the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should

be drawn in favor of the latter all the inferences that fairly are deducible from them. *Texas & Pacific Ry. Co.* v. *Cox,* 145 U. S. 593, 606, 12 S. Ct. 905, 36 L. Ed. 829; *Gardner* v. *Michigan Central Railroad,* 150 U. S. 349, 360, 14 S. Ct. 140, 37 L. Ed. 1107; *Baltimore & Ohio R. R. Co.* v. *Groeger,* 266 U. S. 521, 524, 527, 45 S. Ct. 169, 69 L. Ed. 419. Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."

In the case of *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U. S. 555, this court said:

"* * * And the finding of the jury upon that question must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." (Citing cases.)

In the case of *Seaboard Air Line Railway* v. *Koennecke,* 239 U. S. 352, as to questions under the Employers' Liability Act, this court said:

"Next it is urged that there was no evidence that the deceased was employed in interstate commerce. Upon such matters, as upon questions of negligence and the like, brought here only because arising in actions on the statute, and involving no new principle, we confine ourselves to a summary statement of results."

In the case of *Louisville & N. R. Co.* v. *Stewart as Administratrix,* 241 U. S. 261, another case under the Employers' Liability Act, this court made the following observation:

"The railroad company contends at some length that the case should have been taken from the jury by the direction of a verdict in its favor. As the opinion

of both courts below and the jury were against it, and as we agree with their judgment, we shall not discuss this assignment of error at length. *Great Northern R. Co.* v. *Knapp*, 240 U. S. 464, 466, 60 L. Ed. ....., 36 Sup. Ct. Rep. 399."

We submit that the opinion of the Supreme Court of Arkansas in this case is in entire accord with the foregoing and many other decisions of this court upon the question of substantial testimony and the weight and determination of the sufficiency thereof. The Supreme Court of Arkansas applied to the facts in this case the rule announced by this court. It held that there must be substantial testimony establishing negligence. Finding the testimony "in sharp dispute," it said in reference to the testimony on the part of respondent:

> "* * * Such evidence was substantial—positive—not at all impossible or even improbable, though for the most part contradicted. It was, under such circumstances, the function of the jury to settle or determine which theory was true, and having decided these matters for appellee we may not as a proposition of law declare there was error in so deciding."

It would seem unnecessary to say that this declaration of law as applied to the facts is in keeping with the repeated holdings of this court under similar circumstances.

We might well call attention to many cases where judgments have been sustained involving facts similar to those disclosed in this record. We content ourselves, however, with a reference to only a few of those as made by the Supreme Court of Arkansas in the following quotation from its opinion:

> "It hardly seems necessary to do so, but we now cite some authorities from other jurisdictions in the

determination of similar facts to these we are considering. *Menafee* v. *Monongahela Ry. Co.*, 148 S. E. 109 (W. Va.); *Cincinnati N. O. & T. P. Ry. Co.* v. *Claybourne's Admr.*, 183 S. W. 903 (Ky.); *L. & N. R. R. Co.* v. *Clark*, 106 S. W. 1184 (Ky.); *Yazoo & M. V. R. Co.* v. *McCaskell*, 79 So. 811 (Miss.).

"All these present facts which are not dissimilar from those in the instant case and some of them arose and were tried under the Federal Employers' Liability Act. In them will be found ample authority to declare negligence on account of improper loading of a car or tender, or from improper handling or operation of trains."

We submit that the writ should be denied.

Respectfully submitted,

THERON W. AGEE,
DAVID S. PARTAIN,
Counsel for Respondent.

END OF A CASE